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No. 87-305

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

JEAN ANN CONE,
Petitioner,

v.

THE FLORIDA BAR, THE FLORIDA BAR FOUNDATION, INC., and HOLLAND & KNIGHT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Eleventh Circuit correctly held that clients having nominal or short-term deposits in lawyers' IOTA accounts do not have a property right in the interest earned on those deposits, so as to come within the protection of the just compensation clause of the fifth amendment, when those deposits are inherently incapable of producing interest net of costs in the absence of the IOTA program.

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RESPONDENTS' BRIEF IN OPPOSITION

CONSTITUTIONAL PROVISIONS AND REGULATION INVOLVED

U.S. Const. amend. V (relevant portion):

> [P]rivate property [shall not] be taken for public use, without just compensation.

U.S. Const. amend. XIV (relevant portion):

> [No] State [shall] deprive any person of life, liberty, or property, without due process of law.

Florida Bar Integration Rule 11.02(4)(d) is inaccurately reproduced in Petitioner's Appendix. The Rule is correctly reproduced in the Appendix to this Brief. Petitioner's error is not material to the issues presented in this case.

STATEMENT OF THE CASE

Petitioner's statement of the case is inaccurate in several material respects. First, it is simply not true that clients of lawyers participating in the Florida Interest on Trust Accounts ("IOTA") program "had no say in the decision as to whether their money would be maintained in . . . an [IOTA] account." Petition at 3. Clients such as Mrs. Glaeser remained free at all times to ask that money held in trust by their lawyers be returned to them. Mrs. Glaeser never made such a request.

Petitioner also provides an incomplete and inaccurate description of the parties' stipulation "that Mrs. Glaeser's $13.75 earned about $2.25 while it was held in Holland & Knight's trust account." Petition at 3. The error is compounded at page 10 of the Petition, where Petitioner makes reference to "the stipulated fact that the money *did* earn $2.25 *net* of all charges." Petition at 10 (emphasis in original). In fact, the parties stipulated that "[a] deposit of $13.75 earning interest at the rate of 5¼% per annum *would earn* a total of approximately $2.25 in interest from December 1, 1981 through September 19, 1984." Joint Factual Stipulation 25 (emphasis added). Respondents have demonstrated through uncontroverted affidavits that a deposit of $13.75 *would earn* $2.25 in interest *only* if (1) minimum balance requirements were met *and* (2) no administrative expenses were incurred in maintaining the account, and that these two conditions can be satisfied *only* by pooling Mrs. Glaeser's funds with other short-term and nominal funds and forgoing any subaccounting. Affidavit of John F. Dwiggins, Comptroller for Holland & Knight (dated Apr. 29, 1985); Affidavit of Herbert C.M. Hoover, Senior Vice President of NCNB National Bank of Florida (dated Apr. 25, 1985); *see Cone v. State Bar of Florida*, 819 F.2d 1002, 1006 n.6 (11th Cir. 1987). To illustrate the principle, it is quite conceivable that the

simple arithmetic exercise undertaken by the lawyers involved in this case to arrive at the figure of $2.25 consumed more than $2.25 in attorney time, calculator depreciation and electricity. Exactly the same principle applies to the subaccounting of IOTA accounts by lawyers or bank officials who are not involved in litigation. It is precisely the *calculation* of the $2.25 which would consume it.

Finally, Petitioner's unduly truncated version of the proceedings below fails to convey the flavor of this lawsuit. Mrs. Evelyn M. Glaeser[1] filed this action against Respondents in October of 1984, on behalf of herself and as putative representative of a class of persons similarly situated, seeking relief for alleged violations of the just compensation clause, denial of procedural due process, conversion and breach of fiduciary duty. Petitioner sought compensatory damages in an amount equal to the interest earned on all IOTA accounts since 1981, punitive damages of approximately $15 million, and an injunction prohibiting the Florida Bar Foundation, Inc. ("the Foundation") from disbursing any IOTA funds on hand or received during the pendency of the action. After Petitioner's motion for a preliminary injunction was denied, Respondents moved to dismiss the Amended Complaint on numerous grounds. While these motions were pending, Petitioner filed a suggestion with the District Court that any member of The Florida Bar should recuse himself from the case. Thereafter, the original trial judge, the Honorable George C. Carr, United States District Judge for the Middle District of Florida, recused himself, and was replaced by the Honorable Seybourn H. Lynne, Senior United States District Judge for the Northern District of Alabama, sitting by designation.

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[1] Mrs. Glaeser died in the summer of 1985 and Jean Ann Cone, personal representative of Mrs. Glaeser's estate, was substituted as party plaintiff. As used in the balance of this brief, "Petitioner" refers either to Mrs. Glaeser or to Ms. Cone, as the context requires.

With Petitioner's concurrence, Judge Lynne stayed discovery [2] and ordered the parties to stipulate to the relevant facts and to submit cross-motions for summary judgment on the constitutionality of the Florida IOTA program. While these motions were pending, Petitioner again attempted to enjoin the Foundation from disbursing IOTA funds. After a hearing, Judge Lynne granted Respondents' motion for summary judgment on the constitutional claims and denied Petitioner's motion for partial summary judgment, thereby mooting Petitioner's motion for an injunction. The District Court declined to exercise pendent jurisdiction over Petitioner's state-law claims. *Cone v. The Florida Bar*, 626 F. Supp. 132 (M.D. Fla. 1985). The United States Court of Appeals for the Eleventh Circuit affirmed, *Cone v. State Bar of Florida*, 819 F.2d 1002 (11th Cir. 1987), and this proceeding followed.

SUMMARY OF THE ARGUMENT

None of the considerations set forth in Supreme Court Rule 17 justifies the grant of a writ of certiorari in this case. In affirming the District Court's decision, the Court of Appeals merely agreed with the explicit holdings of seven state supreme courts and one state intermediate appellate court, and the implicit decisions of some 20 other state supreme courts, *see Cone v. State Bar of Florida*, 819 F.2d at 1006 n.5, that IOTA programs do not work an unconstitutional taking of private property without compensation.

But for the IOTA program, Petitioner's nominal deposit would not have generated net interest because of

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[2] Contrary to Petitioner's suggestion in footnote 3 of the Petition, she had an opportunity to obtain discovery of the administrative costs of subaccounting an IOTA account, she did not object to the stay of discovery in the District Court and she did not raise the "discovery" issue in the Eleventh Circuit. She should not be heard to complain in this Court.

the practical and economic constraints of banking laws and trust account practices. No "property" existed to be taken. As the District Court perceptively noted:

> When Justice Johnson observed in *Himely v. Rose*, 9 U.S. (5 Cranch) 313, 319 (1809), that "interest goes with principal, as the fruit with the tree," his illustration necessarily assumed the existence of a fruit-bearing tree. Mrs. Glaeser had no legitimate expectancy that she would receive income from her $13.75. She may not use the fifth amendment to create a pecuniary windfall where none previously existed.

Cone v. The Florida Bar, 626 F. Supp. 132, 136 (M.D. Fla. 1985) (citation omitted).

The decision of the Court of Appeals is not in conflict with the decision of any other federal appellate court, or with the decision of any state court of last resort, and its resolution of the federal question presented here does not conflict with applicable decisions of this Court. Therefore, Respondents respectfully submit that the Court should decline to grant certiorari.

ARGUMENT

Petitioner would have this Court believe that the grant of a writ of certiorari is necessary to remove the "uncertainty" surrounding the constitutionality of IOTA programs and "resolve the question" once and for all. Petition at 5. However, Florida's IOTA program is certainly and without question constitutional, and the Court of Appeals followed established constitutional precedent in reaching that conclusion.

I. The Decision Of The Court Of Appeals Is In Accord With The Decisions Of All The State Courts That Have Passed On The Constitutionality Of IOTA Programs

At last count, 44 states and the District of Columbia had adopted some version of the IOTA program, whereby

client funds held in trust by lawyers which are either nominal in amount or to be held for a short period of time are pooled and placed in interest-bearing bank accounts, with the interest being used to fund legal aid organizations, law school scholarships and other public-interest measures. ABA IOLTA Clearinghouse, 4 IOLTA Update (Summer, 1987).[3] The startling popularity of these programs is directly attributable to one fact: because of a combination of ethical principles, federal banking regulations and practical economics, funds which are now being put to useful work in support of the public good would otherwise be lent interest-free to financial institutions. A brief description of the background of the IOTA program is necessary for a proper understanding of that fact.

Attorneys frequently have the need to hold the funds of their clients, including cost advances such as Mrs. Glaeser's. When doing so, lawyers are ethically bound to keep such funds in an account separate from the lawyer's own money and available on demand, so that they can be delivered promptly to the client if he or she so requests. *See* Model Code of Professional Responsibility DR 9-102. Historically, this meant that attorneys had to deposit client trust funds into non-interest-bearing checking accounts because federal law until recently prohibited the payment of interest on demand bank accounts. *See* Banking Act of 1933, ch. 89, § 11(b), Pub. L. No. 66, 48 Stat. 181 (1933). In 1980, federal banking laws were changed to allow the payment of interest on certain types of demand accounts, known as negotiable order of withdrawal (NOW) accounts, but the funds in such ac-

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[3] At the time this Update was published, only Alabama, Indiana, New Jersey, Pennsylvania, West Virginia and Wyoming had not adopted an IOTA program. However, Respondents have been informed by members of the ABA IOLTA Clearinghouse that Alabama has since joined the majority camp, bringing the number of participating states to 45.

counts may only be owned by individuals, certain charitable organizations and public entities. *See* 12 U.S.C. § 1832(a) (1982). Thus, a law firm organized as a partnership or corporation cannot maintain a NOW account in its own name, and cannot maintain a NOW account as trustee for its clients if any of those clients is a partnership or corporation. Finally, although there is no legal impediment to placing funds belonging to an individual such as Mrs. Glaeser in a separate NOW account or a pooled NOW account containing only funds belonging to individuals, non-legal obstacles preclude these alternatives. Banks offering NOW accounts customarily impose relatively high minimum balance requirements; Holland & Knight's bank, for example, has always required at least a $100.00 minimum balance, well above Petitioner's $13.75 deposit. Joint Factual Stipulation 28. A pooled account would meet the minimum balance requirement, but Respondents presented uncontradicted affidavit proof that the administrative costs of subaccounting a pooled account would exceed the interest generated by nominal or short-term funds. Affidavit of John F. Dwiggins; Affidavit of Herbert C.M. Hoover. Thus, in the absence of IOTA, law firms such as Holland & Knight would have no choice but to leave their trust funds in non-interest-bearing checking accounts.

The IOTA programs represent a simple means of surmounting these obstacles and eliminating the interest-free use of large quantities of money by financial institutions. Because a non-profit organization such as the Foundation is the sole income beneficiary of the accounts, the programs are in compliance with federal banking laws. Because the income is paid to a single beneficiary, no subaccounting expenses are incurred. In brief, IOTA programs accomplish a useful and lawful transfer of income from financial institutions to worthy public causes. As the Supreme Court of Florida observed when it adopted the program at issue here:

> The foremost objective of our . . . program was to enhance the capability of the legal profession to deliver legal services to the poor. The broad delivery of legal services has long been a cherished commitment of this Court. At a time in this nation when existing governmental resources for this purpose are drastically threatened, our revisitation to this program provides a propitious occasion to reemphasize our commitment and to revalidate our methodology.

In re Interest on Trust Accounts, 402 So. 2d 389, 396 (Fla. 1981) (footnotes omitted). Because the interest income used to accomplish these objectives "would never benefit the client under any set of circumstances," 402 So. 2d at 395, the economic interests of the client are not affected by the program.[4]

The constitutionality of IOTA programs has been tested in one adversarial state court proceeding, *Carroll v. State Bar of California*, 166 Cal. App. 3d 1193, 213 Cal. Rptr. 305 (1984), *cert. denied sub. nom. Chapman v. State Bar of California*, 106 S. Ct. 142 (1985), and eight other state judicial proceedings.[5] All the state

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[4] The District Court specifically found that, absent the IOTA program, nominal or short-term trust funds such as Mrs. Glaeser's are "unproductive and inappropriate for investment." *Cone v. The Florida Bar*, 626 F. Supp. at 133. Petitioner has not challenged this finding.

[5] *In re Interest on Trust Accounts*, 402 So. 2d 389, 395 (Fla. 1981); *In re Petition of Iowa State Bar Ass'n*, No. 84-1641 (Iowa 1984), *cert. denied sub nom. Rowin v. Supreme Court of Iowa*, 105 S. Ct. 2325 (1985); *Petition of Mass. Bar Ass'n*, 395 Mass. 1, 478 N.E.2d 715 (1985); *Petition of Minnesota State Bar Ass'n*, 332 N.W.2d 151 (Minn. 1982); *Petition of New Hampshire Bar Ass'n*, 122 N.H. 971, 453 A.2d 1258 (1982); *In re Interest on Lawyers' Trust Accounts*, 672 P.2d 406 (Utah 1983); *In re Adoption of Amendments to CPR DR 9-102*, 102 Wash. 2d 1101 (1984).

In adopting the IOTA program in its state, the Arkansas Supreme Court did not explicitly address the constitutional issue, but implicitly found that clients have no cognizable property right to the interest generated by IOTA deposits: "At present, the earnings of

courts that have passed on the question have agreed with the Court of Appeals that IOTA programs do not effect an unconstitutional taking because they create income that could not, under any circumstances, accrue to the benefit of the client. Of the remaining 36 jurisdictions that have adopted IOTA programs, at least 20 have done so through judicial promulgation rather than legislation, and these courts must be considered to have implicitly determined that the program being adopted did not violate the constitution. *See Cone v. State Bar of Florida*, 819 F.2d at 1006 n.5. Not a single court has concluded that IOTA programs are unconstitutional. There is no conflict for this Court to resolve.

II. The Decision Of The Court Of Appeals Is Not In Conflict With Precedents Of This Court

Petitioner argues that the holding of the United States Court of Appeals for the Eleventh Circuit is in conflict with this Court's decision in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). In *Webb's*, this Court held unconstitutional a Florida statute which awarded to the clerk of a county court any interest earned on interpleader funds deposited with the registry of the court, where another statute already imposed a fee for the services of the clerk. The principal amount involved in the case was roughly $1,800,000 and the amount of interest approximately $90,000. This Court held that under the peculiar circumstances presented by the case, the statute was unconstitutional:

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funds held in trust accounts can benefit neither the attorney nor the client, but simply redound to the benefit of the depository institution." *In re Interest on Lawyers' Trust Accounts*, 283 Ark. 252, 675 S.W.2d 355 (1984).

Respondents are advised by members of the ABA IOLTA Clearinghouse that the supreme courts of Indiana and West Virginia rejected IOTA programs in their respective states on non-constitutional grounds immaterial to the issue on this appeal.

> We hold *under the narrow circumstances of this case*—where there is a separate and distinct state statute authorizing a clerk's fee "for services rendered" based upon the amount of principal deposited; where the deposited fund itself concededly is private; and where the deposit in the court's registry is required by state statute . . . —Seminole County's taking unto itself . . . the interest earned on the interpleader fund while it was in the registry of the court was a taking violative of the Fifth and Fourteenth Amendments. We express no view as to the constitutionality of a statute that prescribes a county's retention of interest earned, where the interest would be the only return to the county for the services it renders.

449 U.S. at 165 (emphasis added).

The factual distinctions between this case and *Webb's* are obvious. First and most importantly, the $1.8 million fund deposited with the court in *Webb's* was entirely capable of earning interest for its owner outside the interpleader procedure established by Florida law. Mrs. Glaeser's $13.75, in contrast to the $1.8 million in *Webb's*, could not independently earn interest net of administrative costs. In a very real sense, Mrs. Glaeser's $13.75 could not have borne any "fruit" for herself or others but for the IOTA program. *See Cone v. State Bar of Florida*, 819 F.2d 1002, 1004 (11th Cir. 1987); *Cone v. The Florida Bar*, 626 F. Supp. 132, 136 (M.D. Fla. 1985). In *Webb's* there was "property" to be taken; here there is not.

Webb's also is readily distinguishable from this case because the statutory regime found wanting in *Webb's required* interpleading complainants to deposit the sum at issue with the registry of the court. Mrs. Glaeser, however, was not required to deposit her $13.75 with Holland & Knight.

A final distinguishing feature of *Webb's* is that the decision was specifically based on the fact that the Flor-

ida statutes allowed the state to "exact two tolls" by obtaining both a service fee and accrued interest; again, there is no parallel provision here. 449 U.S. at 159. For all of these reasons, every reported IOTA decision considering the fifth amendment "taking" question has found *Webb's* to be distinguishable and therefore not controlling. *See In re Interest on Trust Accounts*, 402 So. 2d 389, 395-96 (Fla. 1981); *Carroll v. State Bar of California*, 166 Cal. App. 3d 1193, 213 Cal. Rptr. 305, 312 (1984); *Petition of Mass. Bar Ass'n*, 395 Mass. 1, 478 N.E.2d 715, 718 (1985); *Petition of New Hampshire Bar Ass'n*, 122 N.H. 971, 453 A.2d 1258, 1261 (1982); *In re Adoption of Amendments to CPR DR 9-102*, 102 Wash. 2d 1101 (1984).

Petitioner also argues that the decision of the Court of Appeals is in conflict with this Court's decision in *Board of Regents v. Roth*, 408 U.S. 564 (1972), apparently because the appellate court asked whether Petitioner had a "claim of entitlement" to the interest generated by her deposit in determining whether it was her "property" for purposes of the just compensation clause of the fifth amendment. *See Cone v. State Bar of Florida*, 819 F.2d at 1004. *Roth* was a procedural due process case, and the relevant language from it is as follows:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

408 U.S. at 577. Petitioner contends that the *Roth* "legitimate claim of entitlement" language is inapposite in a taking case, and particularly so when "the State permits private property to generate a benefit of which it then claims ownership." Petition at 8. This Court, however, has treated the discussion in *Roth* as a general analysis of the concept of "property" for federal constitutional purposes, and has repeatedly cited it in taking

cases as well as due process cases. *See Texaco, Inc. v. Short*, 454 U.S. 516, 525 (1982); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232, 1260 (1987) (dissenting opinion).[6] Indeed, the *Roth* test is used in the very case on which Petitioner so heavily relies, *Webb's Fabulous Pharmacies*:

> We, of course, also accept the further proposition, pressed upon us by the appellees, that "property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). But a mere unilateral expectation or an abstract need is not a property interest entitled to protection.

449 U.S. at 161. In any case, it is quite clear that the decision of the Court of Appeals rested on the commonsense recognition that no property was taken from Petitioner because "[s]tanding alone, her deposit in the IOTA account could not earn anything." *Cone v. State Bar of Florida*, 819 F.2d at 1007. There is no conceivable conflict[7] between that conclusion and *Roth*.[8]

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[6] *Webb's* has also been cited in at least one due process case. *See Hudson v. Palmer*, 468 U.S. 517, 545 n.11 (1984) (Stevens, J., joined by Brennan, Marshall, and Blackmun, JJ., concurring in part and dissenting in part).

[7] Two opinions cited without explanation by Petitioner, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 55 U.S.L.W. 4781 (U.S. June 9, 1987) (No. 85-1199), and *Nollan v. California Coastal Comm'n*, 55 U.S.L.W. 5145 (U.S. June 26, 1987) (No. 86-133), have no bearing whatever on the issues in this case. Both cases assumed the existence of a valid property right and went on to address the question of whether that property right had been taken by state land-use regulation.

[8] Even assuming *arguendo* that Petitioner did have a property right which is protected by the fifth amendment, the IOTA program at most amounts to a constitutionally permissible restriction on the use of that property, not an impermissible taking. The trial court,

CONCLUSION

Because none of the considerations governing the grant of a writ of certiorari justifies such a grant in this case, Respondents respectfully submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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applying the "bundle" and "strand" analysis of *Andrus v. Allard*, 444 U.S. 51 (1979), astutely observed that "the bundle of property rights of clients with nominal or short-term trust deposits is substantially intact: the IOTA program does not interfere with the client's ability to withdraw the . . . deposit and do with it as he wishes. At most, IOTA affects merely one strand of property rights by putting otherwise dormant . . . deposits to work to improve the legal system." *Cone v. The Florida Bar*, 626 F. Supp. 132, 137 (M.D. Fla. 1985). The Court of Appeals did not reach this issue.

APPENDIX

FLORIDA BAR INTEGRATION RULE 11.02(4)(d) (RELEVANT EXCERPTS)

(4) *Trust funds and fees.* Money or other property entrusted to an attorney for a specific purpose, including advances for costs and expenses, is held in trust and must be applied only to that purpose. . . .

(d) *Interest-bearing Trust Accounts.* A member of The Florida Bar who elects to create or maintain an interest-bearing trust account for clients' funds which are nominal in amount or to be held for a short period of time shall comply with the following provisions:

. . .

(iii) Lawyers or law firms electing to deposit client funds in a trust savings account shall direct the depository institution:

(A) to remit interest or dividends, as the case may be, on the average monthly balance in the account or as otherwise computed in accordance with an institution's standard accounting practice, at least quarterly, to the Florida Bar Foundation, Inc.;

(B) to transmit with each remittance to the Foundation a statement showing the name of the lawyer or law firm for whom the remittance is sent and the rate of interest applied; and

(C) to transmit to the depositing lawyer or law firm at the same time a report showing the amount paid to the Foundation, the rate of interest applied, and the average account balance of the period for which the report is made.